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No. 08-1154

In The
Supreme Court of the United States

BRENT D. JOHNSON,
Petitioner,

v.

CLARENDON NATIONAL INSURANCE COMPANY, et al.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Georgia

BRIEF IN OPPOSITION

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March 31, 2009

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the decision of the lower appellate court is purely fact sensitive, turns on the sufficiency of evidence presented at trial and conflicts with no other decision of the Supreme Court, Federal Circuit Courts of Appeal, Courts of Last Resort of any other state or published opinion of any other court, pretermitting want of jurisdiction in the Supreme Court of the United States to consider the Petition.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the lower appellate court determined that there was insufficient evidence presented at trial to establish vicarious liability of ATF Trucking, ATF Logistics and American Trans-Freight, pretermitting want of jurisdiction in the Supreme Court of the United States to consider the Petition.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

GWLS Holdings, Inc., *parent corporation of:*
American Trans-Freight, LLC
ATF Trucking, LLC
ATF Logistics, LLC

There is no publicly held company owning 10% or more of the corporation's stock.

Hannover Re, *parent corporation of:*
Clarendon National Insurance Company

There is no publicly held company owning 10% or more of the corporation's stock.

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INTRODUCTION

The Petition for Certiorari should be dismissed because it is out of time, procedurally defective and frivolous. The time for filing a petition for writ of certiorari is 90 days from the date of the decision of denial of discretionary appeal.[1] The Supreme Court of Georgia denied certiorari to the Court of Appeals of Georgia on November 17, 2008.[2] Although Petitioner sought reconsideration, the rule does not extend the deadline in the event a motion for reconsideration is filed in the court of discretionary review. Hence, the last day for the timely filing of this petition was February 16, 2009.[3] Petitioner did not file until March 13, 2009. Accordingly, this Court lacks jurisdiction to consider the Petition.

The Petition is procedurally defective and should be dismissed. Petitioner failed to file the required notice of intent to petition for writ of certiorari to the Supreme Court of the United States in the Court of Appeals of Georgia within 20 days after denial of a petition for writ of certiorari by the Supreme Court of Georgia.[4] Further, Petitioner failed to file the required notice of filing a petition for writ of certiorari in the Court of Appeals of Georgia simultaneously with the

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[1] *See* Sup. Ct. R.13.1.

[2] *See* Pet. App. at 44.

[3] The 90th day being Sunday, February 15, the last filing date was February 16.

[4] *See* Ga. App. Ct. R. 38(b)1.

filing of the petition in the Supreme Court of the United States.[5]

The Petition is frivolous. Petitioner's arguments fail to present an issue that meets any criteria for review by this Court.[6] Pretending no record exists, Petitioner presents factually misleading and illusory arguments apparently hoping to create a "certworthy" façade. The truth is there are no issues presented by this case which warrant review by this Court. In both appellate courts below, Petitioner argued that the evidence presented at trial was sufficient to establish vicarious liability on the part of ATF Trucking, a motor common carrier, as a "statutory employer" under the Federal Motor Carrier Safety Regulations. However, as the appellate court below correctly determined, the evidence presented at trial irrefutably proved there was no connection of any sort between ATF Trucking and the tortfeasor. Petitioner asserts that the Court of Appeals of Georgia erred in holding that the evidence was insufficient and that the Supreme Court of Georgia should have granted certiorari to determine that the trial evidence was sufficient to establish vicarious liability.

Offering only disingenuous argument and breathless hyperbole, petitioner seeks to transpose the unique fact pattern of this case into one so common and of such urgency and far reaching impact that it warrants the attention of this Court. Betraying the weakness of Petitioner's premise, the Statement of

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[5] *See* Ga. App. Ct. R. 38(b)2.

[6] *See* Sup. Ct. R. 10.

Fact takes such liberty with the record as to be wholly unreliable. Offering tangential arguments unrelated to a material issue, Petitioner's apparent goal is to present such variety that this Court might stumble upon one of interest. However, Petitioner's penchant for record revision is exposed by the trial transcript. The pertinent facts are fully and accurately set out in the opinion of the lower appellate court.[7] Simply stated, the trial evidence established that there was no relationship, either in fact or by legal fiction, between the tortfeasor and Respondents and therefore nothing upon which to base vicarious liability either at common law or under the Federal Motor Carrier Safety Regulations.

The resounding and inalterable fact is that there was no relationship of any description, formal or informal, between any ATF entity and Robert Wesley Carnley ("Carnley"), the tortfeasor. There is no dispute in the evidence that ATF Trucking, the motor carrier defendant, had no relationship with Carnley or the load he was transporting to the C&C Motor Freight ("C&C") warehouse from the retailer/shipper for consolidation and eventual delivery to California. Therefore, ATF Trucking could not be the statutory employer of Carnley under an implied trip lease or otherwise as expressly set out in the applicable Federal Motor Carrier Safety Regulations.[8] As recognized by the lower appellate court, that point is

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[7] 293 Ga. App. 103, 666 S.E.2d 567 (2008). *See* Pet. App. @ 1.

[8] *See* 49 U.S.C. §14102; *Wilson v. Riley Whittle, Inc.*, 701 P.2d 575, 145 Ariz. 317 (1985); *Fuller v. Riedel*, 461 N.W.2d 97, 159 Wis.2d 323 (1990).

the key point of this case.[9] It is no surprise that this is also the point most consistently ignored and avoided by Petitioner. The issue here is not preemption or the interpretation of the federal regulations or their applicability. This is simply a case where the evidence established at trial absolutely refuted the Plaintiff's theory of liability against Respondents. It is a case where the evidence introduced at trial established without question that there was no relationship between Carnley and Respondents; and, specifically, that there was no relationship between ATF Trucking and Carnley, C&C or any aspect of the subject transaction. Rather than misconstrue statute or case law as Petitioner contends, the lower appellate court reviewed the record and determined that there was no evidence presented at trial that would support vicarious liability. None has been demonstrated in the many amorphous arguments presented by Petitioner during the pendency of this matter since trial. Implicitly acknowledging that fact, Petitioner advocates abandonment of the clear language of the Regulations in favor of a specious "liberal construction" and strict liability theory, yet still fails to demonstrate any support from the record, the Regulations or the case law for that preposterous assertion.

None of the criteria warranting review by this Court is present in this case and it is not supplied by Petitioner's contortions of the facts, circular arguments and tangential references to historical development of Federal Motor Carrier Safety Regulations. The questions presented are intensely factual, and the fact-based decisions of the courts below are not appropriate

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[9] *See* Pet. App. at 1.

for review. Because the Petition is frivolous, filed out of time, procedurally defective and lacking in appropriate questions for review, certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

American Trans-Freight, LLC ("Trans-Freight"), ATF Trucking, LLC ("ATF Trucking") and ATF Logistics, LLC ("Logistics") are separate entities having distinct authority to conduct business.[10] Trans-Freight is a brand identity only, having no trucking or brokerage authority.[11] ATF Trucking is a certificated motor carrier only, having no authority to broker loads.[12] Logistics, a licensed property broker only, had no motor carrier authority.[13] These are undisputed facts.

These parties entered into a Sales Agency Agreement[14] ("Contract") with C&C Motor Freight[15] which provided that C&C operated as a sales agent to solicit freight to be offered to ATF Trucking for transport as motor carrier **or** to be brokered to other motor carriers pursuant to Logistics' brokerage

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[10] T-591-597; R-1721, p.9:1-10; T-395:1-8.

[11] T-395; R-1721, p.9:1-20; R-1723A, p.28:19-22.

[12] R-1721, p.9:1-20; T-591-593; T-395:5-6.

[13] R-1721; R-1723A, p.28:8-10; T-594-596; T-395:7-8.

[14] *See* Pet. App. @ 4.

[15] T-571.

authority.[16] C&C was an independent contractor, expressly forbidden from using the Trans-Freight, ATF Trucking, or Logistics name to identify itself, make contracts, or extend credit.[17] C&C hired Carnley, a local haul independent contractor, to pick up a load of carpet from the local retailer/shipper, Matthews & Parlo, and to bring it to the C&C warehouse for consolidation with other shipments and ultimate transport by whichever motor common carrier the consolidated load was brokered to by Logistics. The related paperwork, including billing of the shippers and receivers on the consolidated load for their portions of the freight charges, collecting and transmitting payment to the carrier for its shipping charges and accounting for those transactions, was handled by Logistics in its function as the freight broker.[18] ATF Trucking had no involvement in any aspect of the transaction with Carnley, C&C, the freight in transit when the accident occurred or the ultimate movement of the consolidated load.[19] The subject accident occurred during the Carnley haul from the local retailer/shipper to the C&C warehouse.

REASONS FOR DENYING THE WRIT

This case involves the untenable claim of Petitioner that a motor common carrier not involved directly,

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[16] T-48; T-372-374; T-571.

[17] T-371,372;T-571.

[18] R-1684; T-341; T-342; R-1748, p.15:13-16; R-1749A, p.32:11-16.

[19] T-338:25; T-339:1-25; T-340:1-25; T-341:1-25; T-342:18-25; T-343:1-4; T-380; T-571.

indirectly, formally, informally or in any other way with any entity involved in the movement of freight should nevertheless be strictly liable for an accident by means of contorting applicable federal regulations that provide for vicarious liability under certain express circumstances so as to create vicarious liability in all instances where a truck is involved in an accident. Here, the evidence is undisputed that there was absolutely no relationship of any description between ATF Trucking, the defendant motor carrier Plaintiff chose to sue, and the driver, Robert W. Carnley, or the property he was hauling at the time of the subject collision.

ATF Logistics, a separate entity, acted as the logistics or administrative broker for the load solicited and obtained by the consolidator, C&C. In an alternative theory of liability, Petitioner claims Logistics is vicariously liable for the negligent hiring of Carnley by C&C. However, C&C performed its business in fact and by contract as an independent contractor in the business of soliciting loads from shippers, consolidating those loads into full truck loads which could then be offered to motor common carriers for transport to a designated location. Logistics, the broker, can not be vicariously liable for the alleged negligence of C&C, the independent consolidator, in hiring Carnley to pick up a load from a local shipper to be returned to the C&C warehouse for consolidation with other such loads into a full truckload eventually to be offered to motor common carriers for movement.[20]

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[20] *Slater v. Canal Wood Corp.*, 345 S.E.2d 71, 178 Ga. App. 877, 880(1)(1986); *McLaine v. McLeod*, 661 S.E.2d 695, 291 Ga. App. 335 (2008).

In this case, in fact, ATF Trucking declined the load and had no connection with the transaction in any respects whatsoever. ATF Trucking was not involved in any aspect of the movement of the subject load to or from the consolidator and had no relationship or arrangement of any sort with Carnley.

Petitioner falsely argues that federal questions were raised below and that the lower appellate court held that the Federal Motor Carrier Safety Regulations (FMCSR) did not apply. Reference to the lower appellate court opinion reveals just the opposite to be true.[21] The Court, in fact, quoted express provisions of the pertinent FMCSR that the parties agreed were applicable and correctly stated the issue for determination was ". . . whether an oral lease agreement can be implied from the record before us."[22] Petitioner falsely claims that C&C operated as "agent" for "ATF"[23] in "dispatching" Carnley to pick up the load involved under no authority other than that of ATF,

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[21] *See* Pet. App. @ 1.

[22] *See* Pet. App. @ 10.

[23] Petitioner persistently refers to ATF Trucking, LLC, ATF Logistics, LLC and American Trans-Freight, LLC, collectively as "ATF" to obscure the fact that each is a separate entity with separate and distinct operating authority. In fact, ATF Trucking, LLC was at no time pertinent to any aspect of this case involved in any way with any part of a shipment, or any entity involved in this case. By contract, C&C was a designated sales agent only and expressly forbidden from holding itself out as having any authority on behalf of any "ATF" entity and was not an "agent" in the legal sense for purposes of *respondeat superior* or any other theory of the laws of Agency.

citing to the record.[24] However, the record does not support Petitioner's statement which is nothing more than an embarrassingly desperate and blatant misrepresentation of the evidence of record. To the contrary, as correctly noted by the lower appellate court, the evidence revealed that Carnley was neither dispatched by or on behalf of ATF Trucking or Logistics nor did he "operate under ATF authority."[25]

Petitioner falsely contends the Georgia opinion conflicts with decisions of federal courts of appeal and supreme courts of other states and counsels techniques for avoidance of the intent of the regulations. Petitioner has cited this Court to no such decisions, because none exist. Petitioner admonishes that renegade and corrupt carriers will use this case as a guide to evade regulation. That is nonsense. Petitioner offers no example and refers to no such incident, because there is none. The absurdity of that argument exemplifies Petitioner's blind obstinacy and demonstrates a willing lack of familiarity with the Georgia appellate court opinion Petitioner now claims review by this Court is warranted. Petitioner mindlessly disputes findings of fact referenced by the lower appellate court and which are contained in the record. Unbelievably, Petitioner contends the appellate court disregarded the applicable regulations yet they are expressly quoted, applied and referenced in the very opinion about which Petitioner complains.

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[24] *See* Pet. @ 11.

[25] *See* Pet. App. @ 11.

Confusion and contortion in application of the law by Petitioner is not indicative of confusion among the courts and Petitioner has demonstrated none. There was simply no relationship express or implied between ATF Trucking, the motor carrier, and any other entity as relates to any aspect of the transaction giving rise to this action. Although Petitioner devotes many pages of argument to historical discussion of the regulations generally and as they relate to statutory employer status based on express or implied trip leases or arrangements between motor carriers and operators, Petitioner ignores the most pertinent fact that the motor common carrier Petitioner chose to sue in this case was not involved in any aspect of the transaction and as such could not have been a statutory employer. Moreover, pursuant to the very cases cited by Petitioner as supportive, the record is devoid of any facts to show any relationship between Carnley and ATF Trucking that could give rise to a suggestion that an oral or implied lease or agreement was made.[26]

Petitioner's fallacious argument reveals uncertain theories as to why certiorari should be granted in this case. Claiming review is warranted because the Georgia appellate court determined that the FMCSR did not apply while in the same argument claiming that the Georgia appellate court misapplied the FMCSR, and that the Georgia appellate court too narrowly construed the FMCSR, Petitioner flounders for a position. The fact is that the Court below determined that the evidence presented at trial

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[26] *See, e.g., Zamalloa v. Hart*, 31 F.3d 911 (9th Cir. 1994); *Cox v. Bond Transp., Inc.*, 249 A.2d 579, 53 N.J. 186 (N.J. 1969).

established that ATF Trucking had no relation to the transaction giving rise to suit and therefore could not be vicariously liable under the Federal Motor Carrier Safety Regulations. The lower court held that ATF Logistics as broker was not liable for negligence of C&C, an independent contractor under the terms of the sales contract, for the selection by C&C of Carnley, an independent contractor owner/operator. The rulings below turn on the specific and unique facts of this case and have limited application. The absence of evidence supporting Petitioner's claims is not overcome by Petitioner's rabid revision of the record and will not be supplied in review by this Court any more than it was supplied by review in the two appellate courts below. This case presents no issue worthy of review by this Court.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Respondents respectfully urge that the Petition be denied.

Respectfully submitted,

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